

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,)

Plaintiff,)

vs.)

Case No.: 2:12-CV-00536-GMN-VCF

AMG SERVICES, et al.,)

Defendants.)

ORDER

Pending before the Court is the Report and Recommendation (ECF No. 226) submitted by United States Magistrate Judge Cam Ferenbach. Defendants AMG Services, Inc., SFS, Inc., Red Cedar Services, Inc., and MNE Services, Inc. (named in the Complaint as TFS) (collectively, “Tribal Entities”); Scott A. Tucker, Blaine A. Tucker, AMG Capital Management, LLC, Level 5 Motorsports, LLC, LeadFlash Consulting, LLC, Black Creek Capital Corporation, Broadmoor Capital Partners, LLC (collectively, “Tucker Defendants”); Park 269 LLC, and Kim C. Tucker (collectively, “Relief Defendants”) have filed an objection. (ECF No. 247.) Also, joining and raising separate objections, are The Muir Law Firm, and Timothy J. Muir (collectively, “Muir Defendants”), (ECF No. 250), and Defendant Troy LittleAxe. (ECF No. 251.) In response, Plaintiff Federal Trade Commission (“FTC”) filed a Response to these objections. (ECF No. 270.) For the reasons discussed below, the Court accepts and adopts in full the Report and Recommendation to the extent that it is not inconsistent with this opinion.

I. BACKGROUND

This case arises from allegedly deceptive pay-day loans. (*See* Compl. ¶¶ 27-45, ECF No. 1.) In response to these deceptive pay-day loans, on April 2, 2012, the FTC filed its complaint (“Complaint”), asserting (1) violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) in counts one and two, (2) violations of the Truth In Lending Act (hereinafter “TILA”) and

1 Regulation Z in count three, and (3) violations of the Electronic Funds Transfer Act (hereinafter
2 “EFTA”) and Regulation E in counts four and count five.¹ (Compl. ¶¶ 46-70.) The FTC also
3 filed a motion for preliminary injunction on the same day, seeking to enjoin the defendants from
4 violating the FTC Act, TILA, and EFTA. (Mot. for Prelim. Inj., ECF No. 4).

5 On May 25, 2012, the Tribal Entities filed a motion to dismiss (ECF No. 100), defendant
6 Don E. Brady filed a motion to dismiss (ECF No. 103), the Muir Defendants filed a motion to
7 dismiss (ECF No. 104), defendant Robert D. Campbell filed a motion to dismiss (ECF No. 105),
8 the Tucker Defendants filed a motion to dismiss (ECF No. 107), and Relief Defendants filed a
9 joinder thereto (ECF No. 108), and defendant Troy L. LittleAxe filed a motion to dismiss (ECF
10 No. 109). Subsequently, pursuant to Local Rule IB 1-4(e), this Court referred these motions to
11 Judge Ferenbach, for a report and recommendation. Thereafter, on August 23, 2012, Judge
12 Ferenbach held a hearing on the pending motions. (ECF No. 152). On November 1, 2012, Judge
13 Ferenbach issued his Report and Recommendation that recommended denying the motions
14 because FTC’s complaint adequately stated a claim. (ECF No. 226.)

15 In response, the Tribal Entities, the Tucker Defendants, and the Relief Defendants filed
16 an objection to Judge Ferenbach’s Report and Recommendation on November 15, 2012. (ECF
17 No. 247.) That objection was joined by Defendant Don E. Brady (ECF No. 248), the Muir
18 Defendants (ECF No. 250), and Defendant Robert D. Campbell (ECF No. 250). In addition to
19 joining the objections that the Tribal Entities, the Tucker Defendants, and the Relief Defendants
20 raised, the Muir Defendants also objected on independent grounds. (ECF No. 250.) Defendant
21 Troy LittleAxe filed an independent objection to Judge Ferenbach’s report and recommendation.
22 (ECF No. 251.) On December 3, 2012, the FTC filed its Response to these objections. (ECF No.
23 270.)

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¹ Count five is asserted only against Relief Defendants Park 269, LLC and Kim Tucker.

II. LEGAL STANDARD

a. Review of a Magistrate Judge's Report and Recommendation

This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). If a party makes a timely objection to the Magistrate Judge’s recommendation, the Court is required to “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.*

b. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. *North Star Int’l v. Arizona Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate when the complaint fails to give a defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In considering whether the complaint is sufficient to state a claim, a court first takes all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Courts, however, are not required to accept as true, allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Legal conclusions are also not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Ultimately, a formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is *plausible*, not just possible. *Id.* (emphasis added) (citing *Twombly*, 550 U.S. at 555). A claim is facially plausible when the plaintiff’s complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the

1 alleged misconduct. *Iqbal*, 556 U.S. at 678. Where the complaint does not permit the court to
2 infer more than the mere possibility of misconduct, the complaint has “alleged—but it has not
3 shown—that the pleader is entitled to relief.” *Id.* (internal quotation marks omitted).

4 Complaints in which the plaintiff alleges fraud must also satisfy the heightened pleading
5 standard of Rule 9(b) of the Federal Rules of Civil Procedure. *Wagh v. Metris Direct, Inc.*, 363
6 F.3d 821, 828 (9th Cir. 2003), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d
7 541, 551 (9th Cir. 2007) (en banc). Specifically, Rule 9(b) requires that “[i]n alleging fraud or
8 mistake, a party must state with particularity the circumstances constituting fraud or mistake.” *Id.*
9 Thus, in addition to pleading plausible allegations, plaintiffs alleging fraud must also plead with
10 particularity. *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1056
11 (9th Cir. 2011). This rule requires that claims of fraud be accompanied by the “who, what,
12 when, where, and how” of the conduct charged, *Yess v. CibaGeigy Corp. USA*, 317 F.3d 1097,
13 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)), such that the
14 complaint may not simply “lump multiple defendants together.” *Destfino v. Reiswig*, 630 F.3d
15 952, 958 (9th Cir. 2011). This requirement ensures that the defendants are on “notice of the
16 particular misconduct ... so that they can defend against the charge and not just deny that they
17 have done anything wrong.” *Yess*, 317 F.3d at 1106.

18 However, the Ninth Circuit has previously stated that courts may relax Rule 9(b)’s
19 particularity requirements in circumstances where it may be difficult for the plaintiff to identify
20 the specific actions that a corporate officer took in causing the harm to the plaintiff. *Moore v.*
21 *Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989) (holding that a complaint need only
22 include the roles of individual defendants in corporate fraud cases, where possible, because such
23 situations make it difficult to attribute particular conduct to each defendant).

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1 **III. DISCUSSION**

2 In his Report and Recommendation, the Magistrate Judge first concluded that the
3 heightened pleading standard applies to the FTC's claims because the claims "sound in fraud."
4 (Report & Recommendation 4:18-19, ECF No. 226.) The Magistrate Judge next determined that
5 relaxing Rule 9(b)'s particularity requirement was appropriate under *Moore*. (*Id.* at 4:19-22.)
6 Consequently, the Magistrate Judge found that the FTC met the pleading standard by sufficiently
7 categorizing the defendants based on their function in the alleged scheme and giving sufficient
8 detail of the alleged scheme. (*Id.* at 4:22-25.) Further, the Magistrate Judge reasoned that by
9 meeting with 9(b) heightened pleading standard, the FTC also met the more general Rule 8(a)
10 standard. (*Id.* at 5 n.2) To that end, the Magistrate Judge gave examples of facts alleged to
11 support the elements of the claims, including explanation of each defendant's role in the alleged
12 scheme and how each defendant relates to the others. (*Id.* at 5:1-13.) Thereby, the Magistrate
13 Judge concluded that the FTC met the 9(b) relaxed pleading standard, that the complaint stated a
14 plausible claim, and that each defendant had fair notice of the claims against them. (*Id.* at 5:13-
15 14.)

16 Defendants' objections fail to establish that this Court should reject Magistrate Judge
17 Ferenbach's Report and Recommendation. Thus, for the reasons discussed below, the Court
18 adopts Judge Ferenbach's Report and Recommendation. Because defendants have filed their
19 own separate objections, in addition to joinders, the Court discusses each objection in turn.

20 **A. Objections of Defendants Tribal Entities, Tucker Defendants, and Relief** 21 **Defendants ("Defendants Set 1")**

22 Defendants Tribal Entities, Tucker Defendants, and Relief Defendants may be grouped
23 and referred to as "Defendants Set 1." In their objection, Defendants Set 1 make arguments
24 relating to the *Iqbal/Twombly* 12(b)(6) standard, Rule 9(b) heightened pleading standard,
25 *Moore*'s "relaxed" standard, and the FTC's standing to bring a TILA claim.

1 **1. *Iqbal/Twombly* 12(b)(6) standard – plausibility**

2 Defendants Set 1 first object to the Magistrate Judge’s conclusion that if claims satisfy
3 the “Rule 9 heightened pleading standard, they necessarily meet the general pleading standard
4 under Rule 8(a).” All objecting Defendants argue that the Magistrate Judge’s recommendation
5 should be rejected because the Magistrate Judge failed to apply *Iqbal/Twombly* plausibility
6 requirements.

7 Defendants correctly note that the FTC must plead both particular and plausible
8 allegations. However, the Magistrate Judge correctly concluded that the FTC met these
9 requirements in its complaint. First, in the Complaint, the FTC directly or inferentially pleads
10 each element of the claims. Second, the Complaint contains adequate factual support for each of
11 those allegations. Nevertheless, Defendants Set 1 argue that “nearly every allegation in ¶¶ 6-25
12 of the Complaint is either a conclusory statement or a recitation of the elements.” (Objection 7:9-
13 11, ECF No. 247.) This section of the Complaint does include a general allegation that all
14 defendants were involved in a common enterprise through an interrelated network of companies.
15 (Compl. at ¶ 25.) However, these paragraphs also contain descriptions of each defendant and
16 explanations of each defendant’s relation to the other defendants. (*Id.* ¶¶ 6-24, ECF No. 1.) The
17 Complaint further provides details on this common enterprise, namely, the alleged scheme and
18 the categorization of the defendants by count. (*See id.* at ¶¶ 27-45.)

19 Defendants Set 1 fail to persuade the Court that the Magistrate Judge erred in concluding
20 that the Complaint satisfied the applicable pleading requirements. The description of parties, the
21 explanation of the parties’ relations to each other, and the extensive factual allegations and
22 details of the alleged scheme sufficiently states a claim under *Iqbal/Twombly* plausibility
23 requirements. Assuming every factual allegation as true, as the Court must on a motion to
24 dismiss for failure to state a claim, the FTC has stated a plausible claim for relief. For these
25 reasons, the Court holds that the Magistrate Judge’s Report and Recommendation was correct in

determining that the motions to dismiss should be denied.

2. Rule 9(b) heightened pleading and *Moore*'s "relaxed" standard

Defendants Set 1 next argue that the Magistrate Judge erred by applying the relaxed *Moore* Rule 9(b) standard for two reasons: (1) Ninth Circuit law requires strictly limiting the *Moore* exception, and (2) the Magistrate Judge relied on an unpublished decision from this jurisdiction, *FTC v. Ivy Capital*, 2:11-cv-283-JCM-GWF, 2011 WL 2118626 (D. Nev. May 25, 2011).

a. The *Moore* standard applies in this context.

Defendants Set 1 first argue that the Ninth Circuit would not condone extending the *Moore* exception to this case. In support of this proposition, Defendants Set 1 cite a series of factually dissimilar Ninth Circuit cases.² More importantly, in each of these cases, the Ninth Circuit ultimately determined that the plaintiff either had or should have had particularized knowledge of the pertinent facts. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558-59 (9th Cir. 2010) (finding no reason to relax the 9(b) pleading standard under *Moore* because the plaintiffs had personal knowledge of the relevant facts); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010) (holding that the policy reasons for relaxing the 9(b) standard are inconsistent with the purpose of the False Claims Act ("FCA") because the FCA encourages insiders, who should already know the pertinent facts, to disclose information necessary to prevent fraud on the government); *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (declining to relax the 9(b) pleading standard because the plaintiff should have had knowledge of the pertinent facts when he was employed by the defendant when he initiated the suit, was knowledgeable about the allegedly falsified information, and had worked for the company for many years). In contrast to these cited cases, the plaintiff in this case, the FTC, is reasonably unable to obtain specific knowledge at this stage of the litigation of the particularized conduct of

² In fact, *Ivy Capital* and *Moore*, on which the Magistrate Judge relied in the Report and Recommendation, are the much more factually similar and applicable cases than those cases on which Defendants Set 1 rely.

1 each defendant in the alleged corporate fraud. Thus, the relaxed *Moore* standard is properly
2 applied.

3 Second, Defendants Set 1 argue that the *Moore* relaxed 9(b) standard should not apply
4 because Ninth Circuit, in *Ebeid ex rel. United States v. Lungwitz*, previously limited *Moore* to
5 private securities fraud cases. 616 F.3d 993, 999 (9th Cir. 2010). However, this argument
6 misconstrues *Ebeid*. Specifically, in *Ebeid*, the Ninth Circuit declined to extend the *Moore*
7 exception to cases brought under the False Claims Act (“FCA”) because the purpose of the FCA
8 was to encourage insiders to disclose information to prevent fraud on the government. *Id.* As
9 such, these insiders would already know or have access to the pertinent facts. *Id.* Accordingly,
10 the policy reasons that support the *Moore* exception would not apply to cases brought under the
11 FCA. *Id.* Ultimately, although the court chose not to extend *Moore* to the complaint in *Ebeid*, the
12 court did not foreclose the possibility of using the exception in other cases. Because the
13 court’s reasoning hinged only on the purpose of the FCA (to disclose known conduct), *Ebeid* is
14 easily distinguishable from the instant case.

15 Similar to their argument under *Ebeid*, Defendants Set 1 also argue that the *Moore*
16 relaxed 9(b) standard applies only to “a private plaintiff in an insider trading case.” *Neubronner*
17 *v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). The Ninth Circuit in *Neubronner* did recognize that
18 the relaxed 9(b) pleading standard applied in the context of a private plaintiff in an insider
19 trading case. *Id.* However, by noting one scenario in which *Moore* applied, the Ninth Circuit did
20 not necessarily preclude its application in other circumstances not explicitly stated within
21 *Neubronner*.

22 Thus, because the FTC is reasonably unable, at this stage of the litigation, to identify the
23 specific actions that each Defendant took in furtherance of the corporate fraud scheme that
24 caused the alleged harm, the Court holds that the *Moore* relaxed 9(b) standard does apply in this
25 case.

1 **b. The complaint satisfies the *Moore* 9(b) pleading standard.**

2 Because the Court concludes that the *Moore* relaxed 9(b) pleading standard may be
3 applied in this case, the Court next must determine whether the FTC's complaint does in fact
4 satisfy this relaxed pleading standard. In this case, the FTC categorized the Defendants based on
5 their function in the alleged scheme and then detailed the nature of that scheme. Under the
6 *Moore* relaxed 9(b) pleading standard, the FTC need not attribute particular conduct to each
7 defendant. Accordingly, the Court holds that the FTC's complaint satisfies the pleading
8 standard.

9 The arguments raised by Defendants Set 1 do not persuade the court otherwise.
10 Specifically, Defendants Set 1 object to the FTC's "lumping" the defendants together in the
11 complaint and the FTC's failure to "individualize" specific factual allegations against
12 each defendant. Contrary to this argument, the complaint actually goes to great lengths to
13 categorize defendants based on their function in the alleged scheme. Furthermore, the complaint
14 describes the nature of the scheme in sufficient detail. Under the *Moore* pleading standard, in
15 corporate fraud cases, the complaint need only include the roles of individual defendants, where
16 possible, because such situations make it difficult to attribute particular conduct to each
17 defendant. *See Moore*, 885 F.2d at 540. Therefore, the Court disagrees with Defendants and
18 finds that the complaint does give the defendants fair and meaningful notice of the legally
19 cognizable claims and the factual allegations on which they rest. The Court also concludes that
20 the complaint provides sufficient information to allow the Defendants to defend against the
21 allegations.

22 The Magistrate Judge's Report and Recommendation was correct in determining that the
23 FTC's complaint adequately stated a claim and that the motions to dismiss should be denied.

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1 **c. Reliance on *FTC v. Ivy Capital* was not improper.**

2 Defendants Set 1 next object to the Magistrate Judge's reliance on *FTC v. Ivy Capital*,
3 No. 2:11-cv-00283-JCM-GWF, 2011 WL 2118626 (D. Nev. May 25, 2011). Although the *Ivy*
4 *Capital* case is not binding on the Court, the Court is persuaded by this factually similar,
5 concisely-reasoned opinion. Given the similarities between *Ivy Capital* and the instant case, the
6 Magistrate Judge's references to the case were not improper. In *Ivy Capital*, the court first
7 determined that the relaxed 9(b) pleading standard applied. 2011 WL 2118626, at *4. The Court
8 further determined that the complaint satisfied the pleading standard by "categoriz[ing] the
9 defendants based on their function in the alleged scheme" and then providing details of the
10 nature of the scheme. *Id.*

11 Here, the Court has already concluded that a relaxed 9(b) pleading standard should
12 apply because it is difficult, at this stage of the proceedings, for the FTC to identify the specific
13 actions that each corporate officer took in allegedly causing the harm. In addition, the Court has
14 already held that the FTC's complaint satisfies the pleading standard. Specifically, as in *Ivy*
15 *Capital*, the FTC in this case categorized the Defendants based on their function in the alleged
16 scheme and then detailed the nature of that scheme.

17 **3. TILA Claims**

18 Finally, Defendants Set 1 argue that the FTC lacks standing to bring the TILA claim
19 because the FTC failed to adhere to the notice and administrative cease and desist procedures
20 under TILA. However, this section is inapplicable here. Rather, this section applies only when
21 an agency itself imposes an adjustment. If the FTC had imposed the adjustment, only then
22 would the agency need to notify the creditor and complete the administrative cease and desist
23 procedures.

24 Here, the FTC is not issuing the order but rather asks this Court to issue an adjustment
25 order, among other relief. Therefore, the notification and administrative cease and desist

1 procedures are inapplicable. This argument fails on its merits and the Magistrate Judge did not
2 err in recommending denial of the motions to dismiss.

3 **B. Objections of the Muir Defendants**

4 In their objection, the Muir Defendants make arguments relating to the *Iqbal/Twombly*
5 12(b)(6) standard, Rule 9(b) heightened pleading standard, *Moore*'s "relaxed" standard, and the
6 TILA claim. Because many of the arguments overlap, the Court here addresses only the novel
7 arguments.

8 **1. *Iqbal/Twombly* 12(b)(6) standard**

9 The Muir Defendants argue that the complaint contains only two factual allegations
10 specific to the Muir Law Firm. The Muir Defendants further argue that the remaining
11 "boilerplate" allegations are insufficient to state a claim. Contrary to the Muir Defendants'
12 arguments, the FTC's complaint contains sufficient factual allegations connecting the law firm,
13 its principal, and other defendants to the alleged pay-day loan scheme. Specifically, the
14 Complaint alleges that "Defendant The Muir Law Firm . . . [a]t all times material to this
15 complaint, acting alone or in concert with others, . . . advertised, marketed, distributed, or sold
16 the extension of credit in the form of high-fee, short-term 'payday' loans to consumers
17 throughout the United States and participated in the collection of those loans." (Compl. ¶ 16,
18 ECF No. 1.) The Complaint further alleges that "Defendant Timothy J. Muir founded The Muir
19 Law Firm, LLC, is the President of Black Creek Capital Corporation, and, through The Muir
20 Law Firm, LLC, pays for the domain name registrations and other fees of multiple websites used
21 by the [Tribal Entities] to market payday loans. . . . At all times material to this complaint,
22 acting alone or in concert with others, he has formulated, directed, controlled, had the authority
23 to control, or participated in the acts and practices of all the corporate defendants." (*Id.* at ¶ 19).

24 Taking these facts and the extensive factual allegations regarding the alleged scheme as
25 true, the FTC has stated a plausible claim against the Muir Defendants. Even if the same

1 statements are repeated throughout the Complaint, or are “boilerplate” as Muir Defendants argue,
2 the statements are factual statements, are taken as true, and are sufficiently specific to state a
3 plausible claim. Most importantly though, the Complaint gives the Muir Defendants fair and
4 meaningful notice of the legally cognizable claims and the factual allegations on which they rest,
5 such that Muir Defendants may defend against the allegations.

6 **2. Rule 9(b) heightened pleading and *Moore*’s “relaxed” standard**

7 The Muir Defendants echo the objections raised by Defendants Set 1 that the FTC’s
8 “lumping defendants” and failure to “plead each person’s role” in the Complaint results in a
9 failure to state a claim. The Court has already addressed and rejected these arguments in Section
10 A, above.

11 Additionally, the Muir Defendants attempt to argue that the federal government “should
12 be held to much more stringent pleading standards” based on the fact that the government is
13 “vested with and exercised extraordinary pre-litigation investigatory powers.” This argument
14 fails. In fact, the Muir Defendants fail to cite a single authority in support of this curious
15 argument. As such, the Court refuses to apply a “more stringent” pleading standard than the
16 standard that applies to any other plaintiff.

17 For these reasons, the Magistrate Judge did not err in concluding in his report and
18 recommendation that the motion to dismiss should be denied.

19 **3. TILA Claims**

20 The Muir Defendants argue that the FTC cannot state a valid claim against the Muir
21 Defendants because the FTC has conceded that the Muir Defendants are not engaged in lending.
22 Specifically, the Muir Defendants mistakenly characterize the FTC’s reference to “Lending
23 Defendants” in its Opposition to Defendants’ Motion to Dismiss, as a concession that Muir
24 Defendants are not actually the lenders. Considering only the material within the four corners of
25 the Complaint, however, the FTC has adequately pled that the Muir Defendants are lending

1 creditors.

2 Title 15, section 1602(g) of the United States Code defines a creditor as a person who (1)
3 “regularly extends . . . consumer credit . . . for which the payment of a finance charge is or may
4 be required, and (2) is the person to whom the debt arising from the consumer credit transaction
5 is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of
6 indebtedness, by agreement.” 15 U.S.C. § 1602(g). Here, the Complaint alleges that Muir
7 Defendants (1) “advertised, marketed, distributed, or sold the extension of credit in the form of
8 high-fee, short-term ‘payday’ loans to consumers throughout the United States” and (2)
9 “participated in the collection of those loans.” (Compl. ¶ 16, ECF No. 1.) The Complaint further
10 connects Mr. Muir to the lending scheme as “the founder of The Muir Law Firm and president of
11 Black Creek Capital Corporation,” who “through his firm pays for the domain registration fees
12 for the Lending Defendants’ websites.” (*Id.* ¶ 19.) The Complaint further alleges that, by virtue
13 of his position, Mr. Muir controlled one or more Corporate Defendants in the common enterprise
14 and participated in, and had knowledge of, the alleged unlawful lending and collections
15 activities. (*Id.* ¶¶ 17-22, 25.)

16 The Muir Defendants attempt to overcome these statements in the Complaint by claiming
17 that attorneys cannot be creditors and citing a plethora of cases, however, none of these are
18 binding upon or persuasive to this Court. On the contrary, if an attorney’s alleged conduct meets
19 the definition of a creditor, this Court finds no reason that the attorney should not be considered a
20 creditor for the purposes of TILA.

21 Accordingly, the FTC has adequately pled the elements of a TILA claim against the Muir
22 Defendants. Therefore, although the Magistrate Judge did not specifically address this argument
23 in his Report and Recommendation, it nonetheless fails. The Muir Defendants’ motion to dismiss
24 is denied.

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1 **C. Objections of the Defendant LittleAxe**

2 Defendant LittleAxe echoes the objections raised by Defendants Set 1 that the FTC's
3 "lumping defendants" and failure to "plead each person's role" in the Complaint results in a
4 failure to state a claim. Accordingly, the Court has already addressed and rejected these
5 arguments in Section A, above. Additionally, Defendant LittleAxe makes individualized
6 arguments under Rule 12(b)(6) as to each claim.

7 **1. FTC Act Claims**

8 Defendant LittleAxe argues that the FTC has failed to meet the *Iqbal/Twombly*
9 plausibility standard because an alternative set of facts is "more plausible." However, the
10 standard does not require the FTC to plead the "most plausible" or even "more plausible than
11 some other alternative" claims. *See Iqbal*, 556 U.S. at 678. Rather, the standard requires only
12 that the FTC plead a plausible, rather than merely possible claim. *Id.*

13 Here, assuming the facts alleged in the Complaint are true, the FTC has adequately plead
14 that the Defendants, including Defendant LittleAxe, were involved in deceptive trade practices
15 by making misrepresentations about the withdrawal schedule thereby misleading reasonable
16 consumers. Again, the Complaint goes into great detail about the scheme, how it is perpetrated,
17 how it induces reliance, how it defrauds consumers, and how Defendants stand to benefit.
18 Additionally, the Complaint adequately alleges that Defendants called consumers and made
19 threats of arrest and criminal prosecution, even though Defendants had no such power. Most
20 importantly, these allegations give Defendant LittleAxe notice of the allegations he is called to
21 answer. Further, the inference of liability is both reasonable and plausible. Thus, the Magistrate
22 Judge did not err in recommending denial of the motions to dismiss.

23 **2. TILA Claims**

24 Defendant LittleAxe also argues that the Complaint does not allege facts establishing the
25 existence of the requisite legal obligation because "optional payment deferrals" are not legal

obligations requiring disclosure. The Court disagrees. Assuming the facts alleged in the Complaint are true, Defendants have failed to disclose the consumer's actual legal obligations. In fact, the Complaint explicitly alleges that the consumer is obligated to follow the terms of the executed loan contract despite the use of the word "optional" and further alleges that the actual cost to consumers is significantly higher than those costs disclosed. (Compl. ¶¶ 37-41, ECF No. 1.) These allegations plausibly establish that the "optional payment deferral" is a misnomer as its terms actually create a legal obligation. The consumer is bound by the terms of a contract, yet Defendants, including Defendant LittleAxe, have failed to disclose the actual terms of that contract. Therefore, the Magistrate Judge did not err in recommending that the motions to dismiss be denied.

3. EFTA Claims

Defendant LittleAxe argues that the "FTC fails to give specific language that it believes 'requires' consumers to authorize electronic funds transfers." (Objection, 5:21-22, ECF No. 251.) Furthermore, Defendant LittleAxe argues that the FTC "also fails to give the specific language warranting an inference that this authorization was a condition for obtaining credit." (*Id.* at 5:22-6:1.) However, paragraph 42 of the Complaint clearly alleges both these facts, stating: "Defendants' loan application also contains a provision that *requires the consumer to authorize* Defendants to initiate electronic fund transfers for withdrawal of the consumer's recurring loan payments *as a condition of obtaining credit* from Defendants." (Compl. ¶ 42, ECF No. 1, emphasis added.) Thus, the Complaint states a plausible claim with sufficient supporting factual allegations by providing details of the scheme and examples of the loan agreements. Therefore, the Magistrate Judge did not err in recommending denial of the motions to dismiss.

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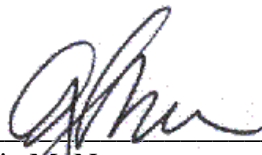
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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Magistrate Judge's Report and Recommendation
3 (ECF No. 226) is **ACCEPTED and ADOPTED** to the extent it is consistent with this order, and
4 the motions to dismiss (ECF Nos. 103, 104, 105, 107, and 109) are **DENIED**.

5 DATED this 28th day of December, 2012.

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11 Gloria M. Navarro
12 United States District Judge
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